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In the
Supreme Court of the United States
October Term 1976

HO CHUNG TSAO
HUNG HOI CHE
CHEUNG CHAN,
Petitioners,

vs.

UNITED STATES IMMIGRATION &
NATURALIZATION SERVICE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 16

CONCLUSION 21

APPENDIX A-1

TABLE OF AUTHORITIES

Page

Cases:

Almeida-Sanchez v. United States,
412 U.S. 266 (1973) 17

Abel v. United States,
362 U.S. 217 (1959) 17

Bilokumsky v. Tod,
263 U.S. 149, 155 (1923) 19

Chew v. Colding,
344 U.S. 590 (1953) 16

Chin Yow v. United States,
208 U.S. 8 (1908) 16

Frost v. Railroad Commission,
271 U.S. 583 (1926) 19

Giegow v. Ubl,
239 U.S. 3 (1915) 16

Graham v. Richardson,
403 U.S. 365 (1973) 16

Guzman-Flores v. I.N.S.,
496 F. 2nd 1245 (7 Cir. 1974) 11

Harman v. Forsennius,
380 U.S. 528 (1965) 19

Japanese Immigrant Case,
189 U.S. 86 (1902) 16

Page

Kessler v. Strecker,
307 U.S. 22 (1939) 16

Lloyd Sabaudo Societa v. Elting,
287 U.S. 329 (1932) 16

Pilliod v. Illinois Migrant Council,
540 F. 2nd 1062 (7 Cr., 1976) 17

Sherbert v. Verner,
374 U.S. 398 (1963) 19

Silverthorne v. U.S.,
251 U.S. 385 (1921) 18

Simmons v. United States,
390 U.S. 377 (1968) 2,19,21

Sung v. McGrath,
339 U.S. 33 (1950) 16

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 17

United States v. Martinez-Fuerte,
428 U.S. (1976) 17

United States v. Campos-Serrano,
413 U.S. 293 (1973) 17

United States ex rel. Mensevitch v. Tod,
264 U.S. 134 (1924) 16

Page

United States v. Ortiz,
422 U.S. 891 (1975) 17

Vajtauer v. Commissioner,
273 U.S. 103 (1926) 16

Weiman v. Updegraff,
344 U.S. 183 (1952) 19

Wong Sun v. United States,
371 U.S. 471 (1963) 18

Constitutional Provisions:

United States Constitution
Fourth Amendment 3
Fifth Amendment 3

Statutes:

Immigration and Nationality Act,
Section 242(b), 8 U.S.C. 1252 (b). 3,19

Immigration and Nationality Act,
Section 291, 8 U.S.C. 1361 3,20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

HO CHUNG TSAO
HUNG HOI CHE
CHEUNG CHAN,
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vs.

UNITED STATES IMMIGRATION &
NATURALIZATION SERVICE
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which sustained final orders of deportation of the Board of Immigration Appeals.

OPINION BELOW

The opinion of the Court of Appeals was rendered on September 10, 1976 and is reported at 538 F. 2d 667 (1976).

JURISDICTION

The judgments of the Court of Appeals were entered on September 10, 1976, Appendix A, pp. A-1—A-6. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners were afforded their constitutional and statutory right to challenge the admissibility of the evidence which was relied upon to establish their deportability where the immigration judge refused the petitioners an opportunity to prove that such evidence was derived from an unreasonable search of their apartments, an illegal seizure of their persons, and a denial of their right to counsel and of their right against self-incrimination while under arrest by the Immigration and Naturalization Service officers?

   (a) Whether petitioners have been denied the right to assert their Fourth Amendment rights where the immigration judge required them first to provide evidence which would have resulted in a waiver of their claim to protection by forcing them to give testimony regarding their alienage, and the time, place, and manner of their entry to the United States?

   (b) Whether the immigration judge properly denied the petitioners the statutory right afforded them by 8 U.S.C. 1252(b) to challenge the admissibility of evidence to be used against them by conditioning their right to testify upon compliance with conditions imposed by provisions of 8 U.S.C. 1361 relating to burden of proof?

   (c) Whether in the light of *Simmons v. United States*, 390 U.S. 377, in challenging the admissibility of documents into evidence upon the grounds of taint, the petitioner may be required to surrender his protection from self-incrimination?

2. Whether evidence identified as a result of an illegal search of petitioners' residence and seizure of their papers, located

and retrieved from distant INS offices, may be used in proceedings to deport the petitioners from the United States?

3. Whether the burden of proof to establish the lawfulness of their presence in the United States was improperly imposed upon the petitioners when they were (a) denied the right to challenge the admissibility of evidence against them and (b) the admission of such documents was used to require petitioners to testify as to their alienage, and the time, place, and manner of their entry to the United States?

RELEVANT CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides in pertinent part:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Immigration and Nationality Act of 1952.

Section 242(b), 8 U.S.C. 1252(b) provides in pertinent part:

> "(3) the alien shall have a reasonable opportunity to

examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government";

Section 291, 8 U.S.C. 1361 provides in pertinent part:

"In any deportation proceeding under Chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States. . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law."

STATEMENT

Ho Chung Tsao, Hung Hoi Che, and Cheung Chan, (hereafter referred to as Tsao, Che, and Chan) were each taken into custody from apartments where they had been living in Dallas, Texas by officers of the Immigration and Naturalization Service, (hereafter referred to as INS) on February 1, 1973[1] (Tsao, R. 2; Che, R. 3; Chan, R. 3) They each were arrested, placed in confinement, thereafter issued orders to show cause why they should not be deported from the United States as natives and citizens of China who were admitted to the United States as crewmen and failed to leave when required. (Tsao, R. 66; Che, R. 95; Chan, R. 182) Each was subsequently released upon bond and directed to appear when required for their deportation hearings. (Tsao, R. 67)

At the deportation hearings, upon advice of counsel, two petitioners declined to identify themselves and each sought to

[1]The records indicate that the date of arrest was February 1, 1973 as to Tsao and January 26, 1973 as to Che and Chan, but the evidence shows that all three were arrested at the same time. The correct date would seem to be February 1 rather than January 26th, since the Orders to Show Cause in each case were served on the former date.

invoke the protections of the fifth amendment permitting them not to give evidence incriminating themselves. (Tsao, R. 24 *et seq.*; Che, R. 53 *et seq.*; Chan, R. 135 *et seq.*) Although the immigration judge permitted the petitioners to decline to give evidence relating to their deportability, he required each of the petitioners to identify themselves as the persons released under bond in connection with the deportation proceedings. Petitioners were advised that without such identification, the Immigration and Naturalization Service would declare their bonds forfeited. (Tsao, R. 00019-21; Che, R. 53-63) Each petitioner thereafter identified himself with the request that the identity be for the sole purpose of establishing that he had complied with the terms of the bond but not for the purpose of establishing his deportability. The immigration judge declined to accept such limitation upon the identities. (Tsao, R. 00019-21; Che, R. 53-63)

In each of the deportation proceedings, the INS trial attorney offered for introduction into evidence documentary evidence containing the petitioners' names and information to establish that they are natives and citizens of China, had entered the United States as crewmen, and had failed to depart the United States when required, namely, the passports or Seamen's Identity Book, a Report of Deserting Crewmen and a Record of Failure to Depart. (Tsao, R. 68-74; Che, R. 96-97; and Chan, R. 184-195)

Prior to introduction of such evidence, the petitioners requested a *voir dire* examination to determine the admissibility of the documents. The petitioners contended that each of the documents was available for production into evidence as the direct result of an illegal search and seizure of the petitioners' apartments. The immigration judge refused to permit such an examination unless the petitioners first testified regarding their nationality and the time, place, and manner of their entry to the United States. Petitioners declined to give any testimony

regarding their nationality, or the time, place, and manner of their entry to the United States, relying upon their right not to incriminate themselves and contending that their right to challenge illegal evidence could not be conditioned upon such testimony. (Tsao, R. 24 *et seq.*; Che, R. 66 *et seq.*; Chan, R. 135 *et seq.*)

As to Cheung Chan[2]

A Seaman's Identity Book "issued by the Government of Hong Kong to CHAN CHEUNG" was offered in evidence by the Immigration and Naturalization Service trial attorney "based on the identity of names and also on the basis of the photograph attached" in the book. (Chan, R. 136) Petitioner requested an examination *voir dire* "to ascertain the basis upon which this seaman's identity book came into possession" of the Immigration and Naturalization Service, asserting that he had "testimony relating to the circumstances under which this book and other documents were acquired. . . . ." (*ibid*, R. 137).

The immigration judge permitted the first question: "Mr. Chan, where were you residing during the month of January, 1973?" At that point the Immigration and Naturalization Service trial attorney objected:

> "I object to any questions concerning the circumstances surrounding the respondent's arrest. If he has refused to testify concerning the time, place, and manner of his entry, he does not have the right to testify concerning the circumstances of the arrest. Now I can state this much for the record: that the document which I just tendered in evidence was not in the respondent's possession when he was arrested and it was not obtained as a

[2]Chan's hearing was the first; Che's the second, and Tsao's the third.

> result of the arrest. It was already in existence, and it was in existence on the day that his agent or his employer's agent reported him as a deserting crewman, and I intended to go one step further and present the I-409, Report of Deserting Crewmen." (Chan, R. 138).

Following an exchange, the petitioner was limited to first responding to the question whether the seaman's book was in his possession at the time of his arrest. (Chan, R. 139-40). He declined to answer upon the ground that his answer would incriminate him, unless he first was permitted to have an examination *voir dire* as to its admissibility, contending that "the document was produced as a result of illegal search" of his apartment and proffered evidence that:

> "Respondent and one additonal witness will testify that on the morning of January 26th, I believe, at approximately 7:30 three immigration officers came to their apartment, an apartment at – Apartment 11, West Park Apartments, Bowser Street in Dallas, Texas, and came into the apartment, once the door was open slightly, by pushing the door open, without permission, did not have any conversation in the English language with the respondent or the other witnesses, ransacked the entire apartment by going through all the drawers, all the desks, all the papers, all the closets, and in the course of ransacking the apartment they discovered certain documents which tended to show that the respondent, as well as one other witness, were aliens illegally in the United States; that the information derived from this search was used to establish the identity of the respondent and to establish evidence that he may be illegally in the United States. If this sea-

man's book was not in fact a book that was in the apartment of respondent, the ability of the Immigration and Naturalization Service to locate this seaman's book and to produce it into evidence today is derived directly from the illegal search. Now that's the nature of our proffer, and I do request the opportunity to produce Mr. CHAN, Mr. CHE HUNG HOI, and Mr. CHARLES LEE as witnesses to establish this evidence."
(Chan, R. 141-42)

Instead of permitting the petitioner to present his evidence, the immigration judge permitted the INS trial attorney "to develop how [the seaman's identity book] was obtained" (Chan, R. 143).

The trial attorney's method was to offer in evidence a second document, a "Report of Deserting Crewmen also relating to Cheung Chan [which] also refers to the seaman's book. . ." (Chan, R. 144)

Petitioner again on ground of self-incrimination declined to answer when asked whether the information contained in the report "relates" to him. (Chan, R. 146) It was then offered in evidence "based on the identity of names and. . .on the fact that [it] is an official document required by law." (Chan, R. 147)

Petitioner then renewed his request for an examination *voir dire* to show that "all information relating to Chan was derived from an illegal search of his apartment." (*Ibid.*) While this request was pending, the immigration judge admitted the seaman's identity book into evidence. (Chan, R. 148)

At that point, the INS trial attorney "invoke[d]" Section 291 of the Immigration and Nationality Act, 8 U.S.C. 1361, and moved that the petitioner "be instructed to establish the

time, place, and manner of his entry [to the United States] or else be held accountable for his refusal to testify," (Chan, R. 149), urging upon the basis of a prior administrative decision, that when an "alien refuses to testify concerning the time, place, and manner of his entry, and refuses to testify concerning his citizenship, that he shall not be permitted to question the illegality of his arrest." (Chan, R. 152)

The immigration judge, holding that there is no evidence that the documents offered in evidence were in the physical possession of the petitioner at the time of his arrest, and that there had been no testimony regarding the manner of the petitioner's entry to the United States or his citizenship, and relying upon *Matter of R. S.*, 7 I&N Dec. 271, overruled petitioner's request for an examination *voir dire* (Chan, R. 152-153.

Petitioner requested reconsideration of the decision, supplementing his previous proffer of evidence with the statement that:

"the testimony will show Mr. CHARLES LEE was phoned by officers of the Immigration and Naturalization Service to come to the apartment, which he did at approximately eight o'clock, a half hour later, and at that time the three respondents Mr. CHAN, Mr. CHE, Mr. TSAO were all in the physical custody of the Immigration and Naturalization Service officers, with a key which they did not obtain from the respondents, entered without permission the apartment belonging to one of them, conducted in Mr. LEE's presence a further search of the apartment, where they ransacked the apartment, looking for more documents; that thereafter they went to the office of the I&N Service in Dallas where they took an extensive statement from the respondent, without advising him of his right to counsel, without advising him he did not have to answer questions if

> he chose not to. Now we contend that upon the basis of that improper questioning and on the basis of that improper search, the Immigration and Naturalization Service was able to locate the seaman's identity book which is now being introduced in evidence and to locate the Report of Deserting Crewmen which is now introduced into evidence; and I urge upon the Immigration Judge that these, (sic) that these two documents were factually and illegally derived from an illegal search and therefore they are not admissible. We are prepared to establish what I have proffered by way of testimony from Mr. CHARLES LEE, from Mr. CHAN, and Mr. CHE." (Chan, R. 158-59)

The immigration judge declined to reconsider his ruling. (Chan, R. 159, 162, 164-66)

Thereafter, a further document, Record of Failure to Depart, relating to CHAN CHEUNG was introduced into evidence over similar objection. (Chan, R. 161).

Based upon the documents admitted into evidence, the immigration judge entered a decision finding that the petitioner is deportable, (Chan, R. 43-47). On appeal, the Board of Immigration Appeals sustained the decision, finding:

> "that evidence sufficient to establish deportability was in possession of the Service at the time of the respondent's apprehension and that his deportability has in fact been established by clear, convincing and unequivocal evidence. Further, we have held that the Service is not called upon to justify the manner in which it obtained its evidence unless the respondent presents some competent evidence in support of his claim that tainted evidence has been used against him. Likewise, the Service is not called upon to justify the manner in which it apprehended an alien, unless the latter presents some competent evidence to show that there was an illegal arrest. See *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971), and *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971). We also note that the illegality of an arrest does not destroy a later valid proceedings. See *Guzman-Flores v. INS*, 496 F. 2nd 1245 (7 Cir. 1974), and cases cited therein."

As to Hung Hoi Che

The record of proceedings relating to Che is similar to that set forth above regarding Chan. A "Seaman's Identity Book issued to CHE HUNG HOI, the person having the identical name under which the person before you [the immigration judge] was placed under deportation proceedings" was offered in evidence. (Che, R. 66) A proffer of evidence was made to show that the petitioner's apartment was illegally searched, the petitioner illegally arrested and interrogated while in the custody of INS officers, and that it was as the result of the illegal search, seizure, and questioning, that the "Seaman's Identity Book has been linked to the respondent who is here in this [deportation hearing] room." (Che, R. 68-69/93). Similar offers and proffers, and objections to the admission into evidence were made regarding "Report of Deserting Crewmen and a Record of Failure To Depart." (Che, R. 71, 74)

The imigration judge ruled that: "If the respondent [petitioner here] is willing to testify concerning the time, manner, and place of entry, I will let him testify as to the legality of the arrest." (Che, R. 83)

Petitioner declined to give such testimony relying upon grounds of self-incrimination. (Che, R. 86). The documents

were admitted into evidence. (Che, R. 73-74) The immigration judge thereafter entered a written decision finding that the petitioner is deportable. (Che, R. 44-47) On appeal, the Board of Immigration Appeals sustained the finding by the immigration judge in an opinion similar to that rendered in the *Matter of Cheung Chan*, but held further that:

> "An immigration judge's refusal to permit a respondent to testify concerning an alleged unlawful arrest and search is not prejudicial error or a denial of a full and fair hearing where the respondent has steadfastly refused to testify as to his alienage, and the time, place, and manner of his entry. *Matter of R-S*, 7 I&N Dec. 271 (A.G. 1956)" (Che, R. 4)

As to Ho Chong Tsao

Identical rulings were made with regard to the admission of documents connecting Ho Chong Tsao with the allegations contained in the order to show cause why he should not be deported. (Tsao, R. 00066) The immigration judge initially permitted the petitioner to "testify concerning where this document [a Taiwan Passport] was and how it came into the possession of the Immigration Service, and what he has to say about that." (Tsao, R. 00041) and the petitioner was therefore asked:

> Q "Mr. Tsao, I show you this document and ask you whether this was ever in your possession?"

Mr. Maldonado (INS trial attorney) to the immigration judge:

> A "I object to that question. I thought the purpose of this question was to determine whether it was in his possession at the time of his arrest or near to where he was arrested, not whether it was ever in his possession. Definitely it was in his possession at one time: when it was issued and up to the time he was arrested, and I move that Counsel be instructed to limit his questions to that one aspect of the issue."

The immigration judge:

> "Well, if there are other questions, they will not be strictly on *voir dire*."

Mr. Carliner to the immigration judge:

> "Well, if the counsel is to be limited as to the conduct of his examination regarding the document, then I think that's an inappropriate limitation on the examination. One has to establish that it relates to him, that it was at any time in his possession, and through a chain of events – if I'm going to be limited to the one question whether –

The immigration judge:

> "No, you can ask him those questions, Counsel, but I am going to have to let Mr. Maldonado cross examine him on those."

Mr. Carliner:

> "Yes, I cannot anticipate Mr. Maldonado's questions, and I will not obviously preclude him from asking whatever question he sees fit."

The immigration judge:

> "But if we go into matters beyond what I have ruled that you may do, they will be considered in

this hearing for all purposes." (Tsao, R. 00042-43)

The immigration judge restated his prior rulings in the companion cases refusing to permit the petitioner to testify regarding the circumstances under which the documents were linked to him:

> "Well, Your Honor, let me ask Your Honor if Your Honor is saying that the offer which I propose to make, namely, that the respondent - - - respondent's apartment was illegally entered without permission by the officers of the Immigration Service, on or about February 1, that his apartment was searched, and that he was thereafter taken into custody of the Immigration Service and questioned, without the right of counsel and without notice being given to him that he need not give any answers, then I cannot tender the specific items which establish this, unless respondent first testifies regarding to his time, place, and manner of entry into the United States."

The immigration judge:

> "That is correct." (Tsao, R. 00046)

Requests were also made that the trial attorney, Mr. Bernabe Maldonado, be made available to testify how the passport, issued in the name of Ho Chong Tsao, came into his possession to be introduced into evidence; (Tsao, R. 0037); that Merle G. Lauer, an INS investigator who served the petitioner with an Order to Show Cause Why He should Not Be Deported, be made available as a witness to establish that, but for the examination of the petitioner when he was under arrest, the passport would not be produced by INS in the deportation proceedings;

(Tsao, R. 0037); and Benjamin Young, who signed Report of Investigation containing allegations regarding Ho Chong Tsao, (Tsao, R. 0032-34); that Merle Lewis, an INS investigator who arrested the petitioner, each be produced as witnesses to testify regarding the circumstances under which the petitioner was arrested and documents relating to him were linked to him in these proceedings.

Each request was denied on, among other grounds, that the petitioner was not first willing to testify "concerning alienage, time, place and manner of entry." (Tsao, R. 0034)

The immigration judge thereafter entered a decision finding that petitioner is deportable and ordered his deportation to Taiwan. (Tsao, R. 00010-13).

The Board of Immigration Appeals (BIA) sustained the finding of deportability upon grounds identical to those set forth in the *Matter of Hung Hoi Che*. (Tsao 000002-5)

The Fifth Circuit affirmed the orders of the Board of Immigration Appeals. The Court found that the "evidence objected to was also in the possession of the I.N.S. before the allegedly legal conduct occurred," and thus, was not tainted. The Court held that the "immigration judge's decision not to allow appellants to testify about the circumstances surrounding their arrest was proper," and the Court stated that the immigration judge had not improperly allocated the burden of proof.

REASONS FOR GRANTING THE WRIT

The underlying issue presented by the case here is whether three persons, claimed to be aliens illegally in the United States but nonetheless persons protected by the due process clause of the Fifth Amendment, can be arrested, placed under deportation proceedings, and ordered deported as a result of actions by INS officers, without warrant and without consent, forcing their way into the petitioners' residence, searching their belongings, and discovering evidence that was used to establish that they are natives and citizens of China who had entered the United States as crewmen and had remained longer than authorized.

The issue is of critical importance to all aliens living in the United States. If left standing, it means that no person, later proved in administrative proceedings before the INS to be an alien illegally in the United States, enjoys the right of the other "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;" and that there is one standard of due process for the person believed to be an "illegal alien;" another for the person who is not.

The historic trend of decisions by this Court has shown a sensitivity to the rights of aliens. *Japanese Immigrant Case*, 189 U.S. 86; *Chin Yow v. United States*, 208 U.S. 8; *Giegow v. Uhl*, 239 U.S. 3, 9; *United States ex rel Mensevitch v. Tod*, 264 U.S. 134; *Vajtauer v. Commissioner*, 273 U.S. 103; *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U.S. 329, 335-336; *Kessler v. Strecker*, 307 U.S. 22; *Sung v. McGrath*; 339 U.S. 33; *Chew v. Colding*, 344 U.S. 590. See *Graham v. Richardson*, 403 U.S. 365, 372; "Aliens as a class are a discrete and insular minority . . .for whom. . .heightened judicial solicitude is appropriate,"

Although this Court has recently examined their rights in the context of criminal proceedings, it has never ruled upon the procedures used by INS in searching and seizing illegal aliens

for the purpose of deportation. *United States v. Martinez-Fuerte*, 428 U.S. _____; *United States v. Ortiz*, 422 U.S. 891; *United States v. Brignoni-Ponce*, 422 U.S. 873; *Almeida-Sanchez v. United States*, 413 U.S. 266; *United States v. Campos-Serrano*, 413 U.S. 293. See *Abel v. United States*, 362 U.S. 217.

The issue may soon be before this Court as the result of the recent decision in *Pilliod v. Illinois Migrant Council*, 540 F. 2d 1062 (7th Cir., 1976), an appeal by the Immigration and Naturalization Service of an injunction issued to restrain INS arrest and search procedures which are also involved here. Because the issues here are similar as applied to the three petitioners who are seeking review of their deportation proceedings, it is believed that the decision by the Fifth Circuit should be reviewed together with any review by this Court of the decision by the 7th Circuit in *Pilliod v. Illinois Migrant Council*.

The legal rationale relied upon by the Court below in upholding the deportation of the petitioners warrants review especially because it permits device in administrative hearings to thwart judicial scrutiny of admittedly illegal INS practices.

Although the identity of the petitioners as aliens illegally in the United States was obtained solely as the result of the clearly illegal actions of INS officers in forcing their way into the petitioners' apartment and ransacking their rooms for identifying papers, the Board of Immigration Appeals, with the approval of the Court below, has held that documents placed in evidence are "untainted", having been "in the possession of the INS before the allegedly illegal conduct occurred." 538 F. 2d at 668. Since it is unquestioned that specific documents introduced into evidence could not have been obtained by INS from among its millions of records scattered in offices throughout the United States without the illegal search and seizure of the petitioners and their papers in their place of

residence, a substantial question is raised whether "granting establishing of the primary illegality, the evidence to which . . . . . objection is made (here) has been come at . . . . . by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488.

The issue is of enormous importance to the protection of the rights of aliens in the United States. Inasmuch as arrival and departure records are maintained for each alien, with certain exceptions, who enters or leaves the United States, 8 C.F.R. 231.1-2, the effect of the holding below is to immunize the INS from the possibility of any challenge of whatever illegal procedure, however, heinous, so long as INS avoids use of the evidence illegally seized and relies instead on the records of admission and departure.

The administrative and judicial rationale which permits the illegal search and seizure of aliens and reliance upon INS records thereby made retrievable for introduction into evidence in deportation proceedings surely stultifies the Fourth Amendment's protection of the right of privacy for aliens in the United States. Before acquiescing in a practice which would have such a devastating impact upon persons residing in the United States, this Court should examine the question whether the ability of the INS to locate the petitioners' passports and seamens' identity books among its files and to produce them at the deportation hearings are the "fruit of a poisoned tree". *Silverthorne v. U.S.*, 251 U.S. 385.

A further question, important to the conduct of a fair hearing, is the refusal of the immigration judge to permit the petitioners to give testimony to establish that their apartments had been unlawfully searched and identifying papers seized unless each petitioner first testified as to "his alienage, and the time, place, and manner of his entry." (Chan, R. 38-60; Che, R.

67-84; Tsao, R. 39-46). The Court below mistakenly treated the petitioners' claim as dealing solely with the unlawfulness of the arrest and chose to ignore their contention that if an alien illegally in the United States can claim that his Fourth Amendment rights have been violated only at the price of giving evidence against himself, he provides the basis for his own deportation and in effect exculpates those who have violated his constitutional rights.

The issue raises both statutory and constitutional questions. 8 U.S.C. 1252(b) provides that an "alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government." At least since *Bilokumsky v. Tod*, 263 U.S. 149-155, the Supreme Court has "assumed that evidence obtained (by INS) through an illegal search and seizure cannot be made on the basis of a finding in deportation proceedings."

The ruling here is especially important to the conduct of deportation proceedings because the Board of Immigration Appeals, with the imprimatur of the Court below, has held the "immigration judge's refusal to permit a respondent to testify concerning an unlawful arrest and search. . .where the respondent has steadfastly refused to testify as to his alienage, and the time, and place and manner of his entry. . .is not prejudicial error or a denial of a full and fair hearing. . ." (R. 6-37).

The ruling below which permits immigration judges to impose conditions in the conduct of deportation hearings which "require the relinquishment of constitutional rights," if it does not warrant summary reversal of the decision below (see *Simmons v. United States*, 390 U.S. 377) at least justifies review in view of this Court's previous holdings. See *Frost v. Railroad Commission*, 271 U.S. 538; *Weiman v. Updegraff*, 344 U.S. 183; *Sherbert v. Verner*, 374 U.S. 398; and *Harman v. Forsennius*, 380 U.S. 528.

A cognate issue, important also to the conduct of a fair hearing, is the allocation by the immigration judge of the burden of proof to establish deportability. With one series of rulings, the immigration judge admitted documents into evidence without permitting testimony challenging their admissibility, and in another series, relied upon those documents as evidence to shift the burden to the petitioners to establish the lawfulness of their presence in the United States.[3](R. 24 *et seq.*; R. 66 *et seq.*; R. 148-152).

The decision below in effect affirms reliance upon Catch-22 deportation hearings which must be regarded as offensive to any norms of fairness. It poses three questions which deserve review by this Court:

(1) Whether the statutory provisions relating to burden of proof in deportation proceedings come into operation before proper evidence has been admitted to establish the alienage of the persons under deportation proceedings;

(2) Whether 8 U.S.C. 1361 which states that "in any deportation proceeding. . .against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States" may be construed to condition the right of such person under 8 U.S.C. 1252(b) to present evidence on his own behalf challenging the admissibility of documents claimed to be tainted;

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[3]Although the Circuit Court found that the "immigration judge agreed to permit testimony by the (petitioners) on the question whether they were in possession of the documents used to establish their deportability at the time of their arrest", the Board of Immigration Appeals found that such testimony was not allowed unless the petitioners first testified to the time, place, and manner of their entry, and the record establishes that immigration judge did not agree to *voir dire* examination only but was permitting the cross examination of the petitioners for all purposes. (R. 34, 42-43, 83).

(3) Whether in order to challenge the admissibility of a tainted document, the petitioner must be subject to unlimited examination by the prosecuting INS officers as to his alienage and thus surrender his protection from self-incrimination. *Simmons v. United States,* Op. Cit.

Each of these questions is of importance to the conduct of deportation hearings, poses significant issues relating to the administration of the deportation laws, and is of crucial significance to the fairness of the hearing procedure, affecting as they do the rights of persons in proceedings to deport them from the United States as "illegal aliens."

CONCLUSION

For the reasons urged above, petitioners urge that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1976

No. 76-1224
Summary Calendar

Your No. A16-004-158

HO CHONG TSAO,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- - - - - -

Petition for Review of an Order of the Immigration and Naturalization Service (Texas Case)

- - - - - -

Before CLARK, GEE and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the petition of Ho Chong Tsao for review of an order of the Board of Immigration and Naturalization Service of the United States, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the order of the Board of Immigration and Naturalization Service in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 10, 1976

Issued as Mandate:

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1976

No. 76-1225
Summary Calendar

Your No. A15-505-801

HUNG HOI CHE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- - - - - -

Petition for Review of an Order of the Immigration and Naturalization Service (Texas Case)

- - - - - -

Before CLARK, GEE and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the petition of Hung Hoi Che for review of an order of the Board of Immigration and Naturalization Service of the United States, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, it is now here ordered

and adjudged by this Court that the order of the Board of Immigration and Naturalization Service in this cause be, and same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 10, 1976

Issued as Mandate:

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1976

No. 76-1226
Summary Calendar

Your No. A15-505-802

CHEUNG CHAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

- - - - - -

Petition for Review of an Order of the Immigration and Naturalization Service (Texas Case)

- - - - - -

Before CLARK, GEE and TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the petition of Cheung Chan for review of an order of the Board of Immigration and Naturalization Service of the United States, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the order of the Board of Immigration and Naturalization Service in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 10, 1976

Issued as Mandate: